Bedford v. Canada, 2010 ONSC 4264 (CanLII)

REASONS FOR JUDGMENT

HIMEL J.:

[1] There has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue. Governments in Canada, as well as internationally, have studied the topic and produced recommendations ranging from creating laws aimed at protecting individuals, families and communities by promulgating tough criminal laws to decriminalizing or legalizing prostitution. Other legal solutions look at the reasons for the existence of prostitution in our society and emphasize the need for social and economic responses. None of the schemes proposed are without controversy.

[2] This case demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected. It highlights the role of the courts and their relationship to the other branches of government.

[3] Prostitution is not illegal in Canada. However, Parliament has seen fit to criminalize most aspects of prostitution. The conclusion I have reached is that three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purpose of engaging in prostitution) are not in accord with the principles of fundamental justice and must be struck down. These laws, individually and together, force prostitutes to choose between their liberty interest and their right to security of the person as protected under the *Canadian Charter of Rights and Freedoms*. I have found that these laws infringe the core values protected by section 7 and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society.

VII. *STARE DECISIS*

[83] In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today. Indeed, several western democracies have made legal reforms decriminalizing prostitution to varying degrees. As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.

VIII. THE EVIDENCE

[84] Evidence in this case was presented by way of a joint application record and a supplementary joint application record. Over 25,000 pages of evidence in 88 volumes, amassed over two and a half years, were presented to the court. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.

[359] Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the impugned provisions sufficiently contribute to a deprivation of their security of the person.

[360] I accept that there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes, and that the impugned provisions make many of these "safety-enhancing" methods or techniques illegal. The two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute.

[361] With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

[362] In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.

IX. THE *CHARTER* ANALYSIS

[216] In light of the fact that the s. 7 arguments raised in this case call into question the means chosen by Parliament to achieve its objectives, it is essential to properly identify the state

objective underlying each of the impugned provisions. Each of the parties presented detailed arguments outlining why their interpretation of the objective of Parliament was the correct one.

[217] Before analyzing the objective of each of the impugned provisions, I turn to an issue raised by the parties concerning whether or not moral disapproval of prostitution represents a constitutionally permissible legislative objective.

[225] . . . a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values. While the avoidance of harm is not a principle of fundamental justice, the Court recognized that there is a state interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.

[249] To constitute the offence of keeping a common bawdy-house there must be proof that the accused (a) had some degree of control over the care and management of the premises, and (b) participated, to some extent, in the "illicit" activities of the common bawdy-house. The accused does not need to personally participate in the "illicit" activities that occur in the place, provided that he or she participates in the use of the house as a common bawdy-house: *Corbeil*, *supra* at p. 834.

[255] . . . I have found that the legislative objective of the bawdy-house provisions is the control of common or public nuisance. The bawdy-house provisions apply to all direct participants in bawdy-house prostitution. Bawdy-house has been interpreted broadly to include any defined space if there is localization of a number of acts of prostitution within its boundaries.

[272] . . . the legislative aim of the living on the avails of prostitution provision is to prevent the exploitation of prostitutes and profiting from prostitution by pimps. A parasitic relationship is required in order to make out the offence. However, the determination of what is parasitic appears to be different based on whether the person lives with a prostitute, or provides business services to a prostitute. In the former circumstance, parasitism requires an element of exploitation. In the latter circumstance, parasitism is found solely on the basis that the service is provided to a prostitute because they are a prostitute. No proof of exploitation is required.

278] . . . the Supreme Court has established that the communicating offence has as its purpose controlling the social nuisance associated with street prostitution. The provision applies to a broad range of expressive behaviour (as long as it is for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute) and it applies to a broad geographical area, as defined in s. 213(2) of the *Criminal Code*.

X. SECTION 7 OF THE *CHARTER*

B) What is the Harm Faced by Prostitutes in Canada?

[293] Evidence from nearly all of the witnesses, the government reports, and additional statistical information provided to the court confirms that prostitutes in Canada face a high risk

of physical violence. It should be noted, however, that most of the evidence provided was in relation to street prostitutes.

[294] Statistics Canada has reported that some people are at a heightened risk of violence and homicide due to their profession. These "occupations at risk" are said to include those in the sex trade, police officers, and taxi drivers.

[295] In its 1997 report, *Street Prostitution in Canada* by Doreen Dushesne (Ottawa: Minister of Industry, 1997), Statistics Canada found that between 1991 and 1995, 63 known prostitutes were murdered. Almost all were female, seven were aged 15 to 17, and most were thought to have been killed by clients. During this period, known prostitutes accounted for five per cent of all female homicides reported (1,118 deaths).

[296] Subsequent Statistics Canada *Homicide in Canada* reports note that prostitutes continue to be killed as a direct result of their profession. From approximately 1996 to 2006, seven prostitutes per year were killed on average as a result of their profession. The reports qualify the results by stating that the number of prostitutes reported killed as a result of their profession most likely *under-represents* the actual figure, as only those incidents where the police are certain that the victim was killed in the course of engaging in prostitution-related activities were counted.

[297] According to the 2007 *Homicide in Canada* report by Geoffrey Li (Ottawa: Minister of Industry, 2008), 15 prostitutes were reported killed due to their profession (although five deaths occurred in previous years).[14]

[298] There are additional examples of evidence presented in this case respecting the high degree of violence experienced by prostitutes . . .

[299] While both parties agree that prostitutes in Canada face a high risk of violence, they disagree as to whether violence is intrinsic to prostitution, or whether there are ways that prostitution can be practised that may reduce the risk of violence to prostitutes.

a. Can the Harm Faced by Prostitutes in Canada be Reduced?

[300] The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.

[301] Factors that may enhance the safety of a prostitute include being in close proximity to people who can intervene if needed, taking the time to screen a client (for example, smelling a potential client's breath, taking credit card numbers, working out expectations and prices), having a more regular clientele, and planning an escape route. While such measures may seem

basic in their ability to reduce the risk of danger, the evidence supports these findings on a balance of probabilities.

(E) Conclusion: The Applicants Have Been Deprived of Security of the Person by the Impugned Provisions

[359] Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the impugned provisions sufficiently contribute to a deprivation of their security of the person.

[360] I accept that there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes, and that the impugned provisions make many of these "safety-enhancing" methods or techniques illegal. The two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute.

[361] With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

[362] In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.

3. Are These Deprivations in Accordance with the Principles of Fundamental Justice?

a. The Law: Arbitrariness

[385] Although I do not find that the bawdy-house provisions are themselves arbitrary, I find that their interplay with the other impugned provisions renders them so. I have found that the safest way to conduct prostitution is generally in-call. The bawdy-house provisions make this type of prostitution illegal. Prostitutes can legally work out-call, which is not as safe, particularly as prostitutes are precluded by virtue of the living on the avails provision from forming certain "safety-enhancing" business relationships (such as hiring a driver or security guard). The other option is for prostitutes to work on the street, which would put them at risk of violating the

communicating provision and further contributing to a form of public nuisance. Additionally, putting prostitutes at greater risk of violence cannot be said to be consistent with the goal of protecting public health or safety. Thus, when seen in conjunction with the other impugned provisions, the bawdy-house provisions are arbitrary in the sense that they may actually exacerbate the nuisance Parliament intends to eradicate. The evidence from the government reports and of Dr. Lowman on the issue of displacement supports the notion that when indoor prostitution is targeted by the police, street prostitution increases (and vice versa).

[386] This evidence was not before the Supreme Court in 1990 when the Court held that the fact that the sale of sex for money is not a criminal act under Canadian law does not mean Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation": *Prostitution Reference* at p. 1141, *per* Dickson C.J.

[387] A similar argument can be made when looking at the communicating provision in conjunction with the other impugned provisions. Moving prostitutes "off the streets and out of public view" in order to combat social nuisance may serve to exacerbate the harm that the bawdy-house provisions target if prostitutes are forced to move indoors. Although prostitutes could conduct out-call work legally, it would be at a risk to their safety, particularly as they are precluded from hiring security guards or drivers. Such an outcome cannot be said to be consistent with Parliament's objectives.

[388] I find the impugned provisions acting in concert are arbitrary in that taken together they are inconsistent with the objective and there is no rational connection between the provisions and their objectives.

(B) <u>Are the Impugned Provisions Overbroad?</u>

[401] To convict a person of a bawdy-house offence, none of the harms the provision is aimed at need to be shown, such as neighbourhood disorder, or threats to public health or safety. The evidence from both parties demonstrates that there are few community complaints about indoor prostitution establishments. In my view, because they assign criminal liability to those direct participants of bawdy-house prostitution who do not contribute to the harms Parliament seeks to prevent, the bawdy-house provisions are overly broad as they restrict liberty and security of the person more than is necessary to accomplish their goal.

[402] In considering the living on the avails provision in relation to its purpose (the exploitation of prostitutes and profiting from prostitution by pimps), it is clear that the means chosen are broader than necessary to accomplish the objective. As mentioned earlier, the House of Lords in *Shaw* recognized the potential breadth of a similar provision, and attempted to limit its scope by introducing the notion of parasitism: consequently, "[t]he grocer who supplies groceries, the doctor or lawyer who renders professional service" to prostitutes were excluded from liability. Parasitism, as interpreted by the Ontario Court of Appeal, appears to have a different meaning based on whether the person lives with a prostitute, or provides business services to a prostitute. Exploitation is only required in the former circumstance. If the mischief of the provision is aimed

at the “abusive and exploitative malevolence” of pimps, to cite Cory J. in *Downey* at p. 36, then the provision is overbroad as a number of non-exploitative arrangements are caught by this provision. Accordingly, this provision restricts the liberty of such persons “for no reason”: *per* Cory J. in *Heywood* at p. 793.

[403] In the *Prostitution Reference*, the majority of the Supreme Court held that the communicating provision was not “unduly intrusive” during its minimal impairment analysis under s. 2(*b*) of the *Charter*. The respondent argues that this settles the issue of whether the communicating provision is overbroad pursuant to s. 7 of the *Charter*.

[408] . . . The finding by Chief Justice Dickson that the legislation is not “unduly intrusive” must be viewed within the context of the right at issue.

[409] In this case, I have determined that the communicating provision sufficiently contributes to a deprivation of the liberty and security of the person of prostitutes. I find that it represents a threshold violation of section 7. In particular, a communication that would allow prostitutes to screen potential clients for a propensity for violence is caught by this provision. It is within this context that I evaluate the applicants’ overbreadth argument. The question that must be addressed here is whether the communicating provision is <u>necessary</u> in order to curtail the harmful effects associated with visible solicitation for the purposes of prostitution: *Heywood* at pp. 792-93. Such effects, as outlined by Dickson C.J., were said to include “street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children”: *Prostitution Reference*, at p. 1135.

[410] I recognize that the geographical overbreadth argument was rejected by the majority of the Supreme Court in the *Prostitution Reference* in its minimal impairment analysis. In that case, the right being intruded upon was the right to free expression for a commercial purpose. Here, the rights violated are liberty and security of the person. However, I find that the communicating provision is necessary to achieve the objective of eliminating social nuisance as stated by Dickson C.J. who held that Parliament’s aim was to discourage the concentration of prostitution activities in any one area as it was the cumulative effect of public solicitation that produces the social nuisance: see *Prostitution Reference, supra* at p. 1136. In my view, the alternatives proposed by the applicant for a narrowly tailored law would have the potential effects of moving prostitution activities to an isolated industrial area or a secluded area of a park. That may result in even more dangerous scenarios with an increase to the harm to the security of the person of prostitutes and may fail to achieve the state’s objective of curtailment of visible solicitation.

(C) <u>Are the Impugned Provisions Grossly Disproportionate?</u>

[427] The evidence demonstrates that complaints about nuisance arising from indoor prostitution establishments are rare. The nuisance targeted includes neighbourhood disruption, and interference with public health and safety. These objectives are to be balanced against the fact that the provision prevents prostitutes from gaining the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate.

[428] The considerations in *Dyck, supra* and *Cochrane, supra* that justified upholding the impugned provisions are absent in the case before me with respect to the effects of the bawdy-house provisions. The provisions drastically infringe upon the applicants' right to security of the person by placing them at a high risk of experiencing violence when practising prostitution outdoors. Specifically, the laws restrict the applicants' ability to make choices capable of reducing the risk of harm to their well-being under threat of penal sanction. I am of the view that the effects of the bawdy-house provisions on the applicants are grossly disproportionate to their purpose.

[429] The living on the avails provision targets the exploitation of prostitutes and prohibiting others from gaining financially from prostitution. This objective is to be balanced against my conclusion that, by preventing prostitutes from legally hiring bodyguards, drivers, or other security staff, the provision places prostitutes at greater risk of harm and may make it more likely that a prostitute will be exploited.

[430] The circumstances considered in *Dyck, supra* and *Cochrane, supra* that justified upholding the impugned provisions are different from those described in the evidence on the effects of the living on the avails provision. The effect of this provision is to prevent prostitutes from lawfully hiring individuals who may be able to protect them from harm. Prostitutes may in turn be forced to rely upon individuals who are willing to face criminal sanctions, and may be more likely to be exploited as a result. The net effect is to make it more likely that a prostitute will be harmed by a client, or in an effort to avoid this, exploited by a pimp.

[431] The provision represents a severe violation of the applicants' *Charter* rights by threatening their security of the person. The law presents them with a perverse choice: the applicants can safeguard their security, but only at the expense of *another's* liberty. In my view, the living on the avails of prostitution provision is, in effect, grossly disproportionate to its objective.

[432] The nuisance targeted by the communicating provision includes noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby. These objectives are to be balanced against the fact that the provision forces prostitutes to forego screening clients which I found to be an essential tool to enhance their safety.

[433] In *PHS Community Services Society*, Rowles J.A. for the majority, held that:

> The effect of the application of the [*Controlled Drugs and Substances Act*, S.C. 1996, c. 19] provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without any ameliorating benefit to those persons or to society at large. Indeed, application of those provisions to Insite would have the effect of putting the larger society at risk on matters of public health with its attendant human and economic cost.

[434] Similarly, in this case, one effect of the communicating provision (as well as the bawdy-house provisions) is to endanger prostitutes while providing little benefit to communities. In fact, by putting prostitutes at greater risk of violence, these sections have the effect of putting the

larger society at risk on matters of public health and safety. The harm suffered by prostitutes carries with it a great cost to families, law enforcement, and communities and impacts upon the well-being of the larger society. In my view, the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance.

4. Are any of the Section 7 Violations Salvageable by Section 1?

[440] The Supreme Court has stated that s. 7 violations are rarely salvageable by s. 1 of the *Charter*: *R. v. D.B.*, 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, 2008 SCC 25 at para. 89, *per* Abella J. for the majority. In *Re B.C. Motor Vehicle Act*, at p. 518, Lamer J. observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." Wilson J., who concurred in the judgment, wrote at p. 531: "I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system" (emphasis in original).

[441] In the case at bar, where I have found all the impugned provisions to be grossly disproportionate, and some to be arbitrary and overbroad, it is not possible to say that the provisions are proportionate or minimally impair the applicants' rights to liberty and security of the person. I, therefore, find that none of the impugned provisions are saved by s. 1.

XI. SECTION 2(*b*) OF THE *CHARTER*

[442] I turn now to a consideration of whether the communicating provision can continue to be upheld as a reasonable limit on freedom of expression as guaranteed by s. 2(*b*) of the *Charter*. Section 2(*b*) states:

> 2. Everyone has the following fundamental freedoms:
>
> > (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[443] In 1990, a majority of the Supreme Court of Canada upheld the communicating provision as a reasonable limit on freedom of expression. For the reasons outlined above, I am of the view that the evidence before me requires that this issue be reconsidered.

1. Is there a Violation of Section 2(*b*) of the *Charter*?

[444] In 1990, the Supreme Court unanimously found the communicating provision to be a *prima facie* infringement of s. 2(*b*) of the *Charter*. None of the parties to this proceeding made submissions to the contrary. I see no reason to revisit this finding.

XII. <u>SECTION 1 OF THE *CHARTER*</u>

[448] . . . The evidence presented in this case affirms the connection between the concentration of street prostitution and this mix of associated ills. I have no difficulty in finding that combating social nuisance is a valid legislative purpose of pressing and substantial concern.

[461] Communication for the purpose of engaging in prostitution by necessity includes communications that serve to screen customers for safety purposes, as these communications are ultimately in furtherance of the eventual transaction. The language of the section is broad enough to capture these safety-driven communications. A conversation aimed at detecting whether or not a potential customer is belligerent, armed, or intoxicated, even one about something as banal as the weather, is a communication that is ultimately directed at safely exchanging sexual services for payment.

[463] Where the state is preventing communication that may reduce the risk of harm, the burden on the Crown to present justification for that prohibition is necessarily high. The state cannot limit protected rights involving core *Charter* values except where the state can provide compelling, evidence-based justifications for those limits. . . .

[468] In the *Prostitution Reference*, Wilson J., cited with approval by the majority on this point, found that the communicating provision was rationally connected to its objective at p. 1212:

> The next question under *Oakes* is whether s. 195.1(1)(*c*) is rationally connected to the prevention of the nuisance. I believe it is. The logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the twofold step of prohibiting the prostitute from soliciting prospective customers in places open to public view and prohibiting the customer from propositioning the prostitute likewise in places open to public view.

I conclude that the communicating provision is rationally connected to its purpose.

[481] [The] evidence suggests to me that Canada's prohibition of all public communications for the purpose of prostitution is no longer in step with changing international responses. These legal regimes demonstrate that legislatures around the world are turning their minds to the protection of prostitutes, as well as preventing social nuisance. The communicating provision impairs the ability of prostitutes to communicate in order to minimize their risk of harm and, as such, does not constitute a minimal impairment of their rights.

[482] The communicating provision, therefore, fails to meet the proportionality test in *Oakes*.

[484] The final balancing at this stage moves the analysis beyond questioning the law's relationship to its legislative purpose. Instead, the purpose is now weighed against the effects,

both intended and unintended, of the impugned provision. While neither the law nor its purpose have changed since 1990, the available evidence demonstrating the effects of the law has grown in strength and volume in the intervening years. It is on the basis of this change that I proceed to weigh the effect that the communicating provision has on prostitutes against the benefit it confers upon communities.

[489] In light of the evidence presented to me and after weighing the importance of the objective and the salutary effects against the deleterious effects of the law, I find the communicating provision to be an unreasonable limit on the freedom of expression.

[498] I find, based upon the evidence before me, that the law does not effectively curtail the social nuisance associated with street prostitution. While the law may allow the police to direct prostitutes towards social service supports or capture pimps on occasion, I conclude that the salutary effects of the communicating provision in combating the social nuisance associated with street prostitution are minimal.

[504] In my view, in pursuing its legislative objective, the communicating provision so severely trenches upon the rights of prostitutes that its pressing and substantial purpose is outweighed by the resulting infringement of rights. This rights infringement is even more severe given the evidence demonstrating the law's general ineffectiveness in achieving its purpose. By increasing the risk of harm to street prostitutes, the communicating law is simply too high a price to pay for the alleviation of social nuisance.

[505] The communicating provision, therefore, fails to meet the proportionality test in *Oakes, supra*. I find that s. 213(1)(*c*) represents an unjustifiable limit on the right to freedom of expression.

XIII. CONCLUSION

[506] I am satisfied that the applicants have met their onus and have proven on a balance of probabilities that the impugned provisions infringe the *Charter* rights of the applicants. The respondent has not been able to demonstrate that the infringement of those rights is justified under s.1 of the *Charter*. Accordingly, I declare that the bawdy-house provision, the living on the avails of prostitution provision, and the communicating provision (ss. 210, 212(1)(*j*), and 213(1)(*c*) of the *Criminal Code*) violate s. 7 of the *Charter*, and cannot be saved by s. 1, and are, therefore, unconstitutional.

[507] I further declare that the communicating provision (s. 213(1)(*c*) of the *Criminal Code*) violates s. 2(*b*) of the *Charter*, and cannot be saved by s. 1, and is, therefore, unconstitutional.

XIV. REMEDY

539] I am mindful of the fact that legislating in response to prostitution raises difficult, contentious, and serious policy issues and that it is for Parliament to fashion corrective legislation. This decision does not preclude such a response from Parliament. It is my view that in the meantime, these unconstitutional provisions should be of no force and effect, particularly given the seriousness of the *Charter* violations. However, I also recognize that a consequence of this decision may be that unlicensed brothels may be operated and in a way that may not be in the public interest. It is legitimate for government to study, consult and determine how to best address this issue. In light of this, I have determined that a stay of my decision for up to 30 days should be granted to enable the parties to make fuller submissions to me on this question or to seek an order for a stay of my judgment.